IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

JOSE ISMAEL RUIZ ZUNIGA,   )
)
                Petitioner,   )
)
        v.   )   1:14CV977
)
STATE OF NORTH CAROLINA,   )
)
                Respondent.   )

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a prisoner of the State of North Carolina, submitted a petition under 28

U.S.C. § 2254 for a writ of habeas corpus by a person in state custody. For the following

reasons, the Petition cannot be further processed.

1.   The filing fee was not received, nor was an affidavit to proceed *in forma
      pauperis* submitted and signed by Petitioner.

2.   Petitioner fails to indicate that state court remedies have been exhausted as
      required by 28 U.S.C. § 2254(b). This Court cannot grant relief unless state
      court remedies have been exhausted. Id. In North Carolina, a petitioner may
      satisfy the exhaustion requirement of § 2254 by raising his claim(s) in a direct
      appeal of his conviction and/or sentence to the North Carolina Court of
      Appeals followed by a petition to the Supreme Court of North Carolina for
      discretionary review, or by raising his claims in a Motion for Appropriate
      Relief ("MAR") and petitioning the North Carolina Court of Appeals for a writ
      of certiorari if the MAR is denied. See Lassiter v. Lewis, No. 5:11HC2082D,
      2012 WL 1965434, at *4-5 (E.D.N.C. May 31, 2012) (unpublished) (citing
      O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999), and N.C. Gen. Stat.
      §§ 7A–31, 15A–1422). Petitioner indicates that he raised some of his claims
      in certain filings, but it does not appear that he exhausted any of them.

3. Petitioner does not name his custodian as the respondent. Rule 2, Rules Governing Section 2254 Cases, requires that the petition name the state officer having custody of the applicant as respondent. The Court takes judicial notice that a proper respondent for North Carolina state prisoners challenging their North Carolina judgment of conviction is the Secretary of Public Safety. Naming the wrong custodian is a common point of confusion, and the Court assumes that Petitioner wishes to name the proper custodian as respondent. Accordingly, unless Petitioner objects within eleven days of the issuance of this Order, the Petition is deemed from this point forward to be amended to name Frank Perry, who is currently the Secretary of Public Safety, as Respondent.
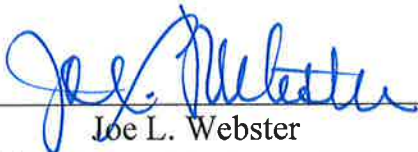
Because of these pleading failures, the Petition should be filed and then dismissed, without prejudice to Petitioner filing a new petition on the proper habeas corpus forms with the $5.00 filing fee, or a completed application to proceed *in forma pauperis*, and otherwise correcting the defects noted. The Court has no authority to toll the statute of limitation, therefore it continues to run, and Petitioner must act quickly if he wishes to pursue this petition. See Spencer v. Sutton, 239 F.3d 626 (4th Cir. 2001). To further aid Petitioner, the Clerk is instructed to send Petitioner a new application to proceed *in forma pauperis*, new § 2254 forms, and instructions for filing a § 2254 petition, which Petitioner should follow.

In forma pauperis status will be granted for the sole purpose of entering this Order and Recommendation.

IT IS THEREFORE ORDERED that *in forma pauperis* status is granted for the sole purpose of entering this Order and Recommendation. The Clerk is instructed to send Petitioner § 2254 forms, instructions, and a current application to proceed *in forma pauperis*.

IT IS RECOMMENDED that this action be filed, but then dismissed *sua sponte* without prejudice to Petitioner filing a new petition which corrects the defects of the current Petition.

This, the 26th day of November, 2014.

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Joe L. Webster
United States Magistrate Judge